

**PERSATUAN KANAK-KANAK SPASTIK SELANGOR & WILAYAH
PERSEKUTUAN v. LOW KOH HWA & ANOTHER APPEAL**

COURT OF APPEAL, PUTRAJAYA
NOR BEE ARIFFIN JCA
SUPANG LIAN JCA
AHMAD ZAIDI IBRAHIM JCA
[CIVIL APPEAL NOS: B-02(C)(A)-202-01-2021
& B-02(C)(A)-203-01-2021]
15 NOVEMBER 2022

Abstract – (i) *In line with the policy and international practice which encourages finality to the process and awards of arbitration, the courts should be slow in interfering with or setting aside an arbitral award. However, where the arbitrator had acted in excess of his jurisdiction in awarding for prayers outside and beyond the scope of reference to arbitration, and where the decision on matters submitted to arbitration could be separated from the rest of the award, the court ought to exercise its discretion to sever the particular part, so as not to set aside the award wholly.* (ii) *An arbitrator is under a duty to disclose any circumstances which are likely to give rise to justifiable doubts as to his impartiality or independence and such circumstances must be disclosed timely. In this case, the arbitrator's disclosure of his acquaintance with the witness of one party and the failure of the opposing party to object or apply for the recusal of the arbitrator manifested the arbitrator as being just and impartial; the circumstances did not warrant the setting aside of the award.*

ARBITRATION: *Award – Findings – Whether findings outside and in excess of 'Terms of Submission to Arbitration' – Whether breached s. 37(1)(a)(iv) of Arbitration Act 2005 – Whether award on matter outside scope of reference to arbitration – Whether part of award severable from other awards – Whether severable part of award should be set aside*

ARBITRATION: *Arbitrator – Relationship with witness – Whether arbitrator made full and timeous disclosure of relationship with witness – Whether arbitrator breached 'public policy' – Whether declaration of acquaintance sufficient to show impartiality – Whether party objected to arbitrator's appointment or continuation of proceedings – Whether failure to object showed confidence in arbitrator's impartiality – Arbitration Act 2005, ss. 14 & 15(1)*

The appellant, Persatuan Kanak-Kanak Spastik Selangor dan Wilayah Persekutuan ('PKKS'), appointed the respondent, Lee Koh Hwa ('LKH'), a certified architect for the reconstruction of its spastic centre for a total cost of RM20 million. Subsequently, disputes arose between PKKS and LKH as to the balance of the professional fees payable to LKH for the works/services

- A rendered. LKH claimed that PKKS still owed him the amount of RM485,269.33 being the balance of his professional fees due and owing, whilst PKKS claimed to have paid LKH the sum of RM868,600 which it averred to be more than enough for the works undertaken by LKH. The dispute was referred to arbitration. At the arbitration proceedings, after
- B LKH, who represented himself, had finished giving evidence and before PKKS's witness Dato' Dr Mohinder Singh was to give his evidence, the arbitrator informed LKH that he was an acquaintance of the witness. Following the disclosure, the arbitration proceeding was adjourned, to give a chance to LKH to appoint a lawyer to represent him on the next/
- C proceeding date. On the next proceeding date, LKH turned up with his counsel. However, there was no record to show that LKH or his counsel had raised any objection to the arbitrator continuing to preside as arbitrator. Thus, the arbitration proceeded on before the same arbitrator. The arbitrator's final award favoured PKKS that: (a) LKH was only entitled to claim the amount of RM747,250 as professional fee from PKKS; (b) LKH
- D was estopped from claiming from PKKS professional fee in excess of the amount of RM747,250; (c) PKKS had overpaid LKH the amount of RM72,750 and therefore, the amount overpaid shall be refunded by LKH to PKKS; (d) LKH shall pay interest at the rate of 5% per annum on the amount overpaid from the date of the award until full realisation; and (e) the costs of the arbitration totalling RM36,598 shall be paid by LKH. LKH applied to set aside the award pursuant to s. 37(1) of the Arbitration Act 2005 ('AA'), whilst PKKS, on the other hand, applied to register the award for the purpose of enforcement under s. 38(1) of the AA. The High Court Judge ('HCJ'), in setting aside the whole award, allowed LKH's application and dismissed
- F PKKS's application finding that: (i) the award/order for 'overpayment' and 'interest on overpayment' (awards 'c' dan 'd') was something outside and was in excess of the 'Terms of Submission to Arbitration' and therefore had breached s. 37(1)(a)(iv) of the AA; and (ii) the arbitrator had failed to make full and timeous disclosure of his relationship with PKKS's witness before the commencement of the arbitration proceeding and had only did so after
- G LKH concluded his testimony. Hence, these appeals by PKKS: (i) Appeal No 202: against the decision of the HCJ in allowing LKH's application to set aside the award; and (ii) Appeal No. 203 against the HCJ's decision dismissing the application by PKKS to enforce the award.
- H **Held (allowing appeal No 202 in part; allowing appeal No. 203)**
Per Ahmad Zaidi Ibrahim JCA delivering the judgment of the court):
- (1) The award pertaining to 'overpayment' was very clear, specific and distinct, it could easily be severed from the rest of the other awards. The HCJ had erred in invoking s. 37(1)(a)(iv) of the AA and in not applying
- I s. 37(3) of the AA instead. The HCJ ought to have invoked s. 37(3) of the AA which gives the court the discretion to set aside only any award which was erroneously handed down in excess of the 'Terms of

Submission to Arbitration' Therefore, only award/order (b) and (c) should be set aside, whereas, award/order (a) dan (d) should be maintained. (paras 31, 32 & 34)

- (2) The declaration/information by the arbitrator of his relationship/acquaintance with the witness was more than enough/sufficient to trigger a concern of impartiality or independence of the arbitrator for LKH to raise a complaint and to invoke s. 15 of the AA. Even though the arbitrator did not make the required declaration 'timeously' pursuant to s. 14 of the AA, the arbitrator had declared to LKH the most crucial fact and information. Hence, the HCJ was plainly wrong and had misdirected himself in invoking s. 14 of the AA. There were no exceptional circumstances to warrant the HCJ to set aside the whole award. (paras 40, 43 & 44)

- (3) The disclosure by the arbitrator provided LKH the avenue to object under s. 15(1) of the AA. However, LKH failed to exercise that right which showed that LKH had full faith in the arbitrator's independence and impartiality. It was only when the arbitrator's award/decision did not go his way that LKH raised the issue as to the independence and impartiality of the arbitrator before the High Court. The action was clearly an attempt to circumvent the provision of s. 15(1) of the AA. LKH was never prejudiced and there was no contravention/breach of public policy. (paras 46-48 & 51)

Case(s) referred to:

Dato' Dr Muhammad Ridzuan Mohd Salleh & Anor v. Syarikat Air Terengganu Sdn Bhd [2012] 6 CLJ 156 HC (*refd*)

Garden Bay Sdn Bhd v. Sime Darby Property Bhd [2018] 6 CLJ 199 CA (*refd*)

Jan De Nul (Malaysia) Sdn Bhd & Anor v. Vincent Tan Chee Yioun & Anor [2019] 1 CLJ 1 FC (*refd*)

Jan De Nul (Malaysia) Sdn Bhd & Anor v. Vincent Tan Chee Yioun & Anor And Other Appeals [2017] LNS 1580 CA (*refd*)

Kerajaan Malaysia v. Perwira Bintang Holdings Sdn Bhd [2015] 1 CLJ 617 CA (*refd*)
Magna Prima Construction Sdn Bhd v. Bina BMK Sdn Bhd & Another Case [2015] 11 MLJ 841 (*refd*)

Master Mulia Sdn Bhd v. Sigur Rus Sdn Bhd [2020] 9 CLJ 213 FC (*refd*)

Thai-Lao Lignite Co Ltd & Anor v. Government Of The Lao People's Democratic Republic [2017] 9 CLJ 273 FC (*fol*)

Legislation referred to:

Arbitration Act 2005, ss. 14(1), (2), (3)(a), (b), (4), 15(1), 37(1)(a)(iii), (iv), (b)(ii), (3), 38(1), 39

For the appellant - Ankit R Sanghvi; M/s Halim Hong & Quek

For the respondent - Steven Wong Chin Fung; M/s Arifin & Partners

[Editor's note: Appeal from High Court, Shah Alam; No: BA-24C-87-09-2020 (overruled).]

Reported by Suhainah Wahiduddin

A JUDGMENT

Ahmad Zaidi Ibrahim JCA:

Introduction

B [1] This ground of judgment covers two appeals *ie*, Rayuan Sivil No. B-02(C)(A)-202-01-2021 (Appeal No. 202) and Rayuan Sivil No. B-02(C)(A)-203-01-2021 (Appeal No. 203). Both the appeals were filed by the appellant, the Persatuan Kanak-Kanak Spastik Selangor dan Wilayah Persekutuan. The respondent in both the appeals is the same individual, En Low Koh Hwa @ Low Kok Hwa (LKH).

C [2] Onwards, the parties shall be referred to by their acronym *ie*, PKKS (Persatuan Kanak-Kanak Spastik Selangor dan Wilayah Persekutuan) and LKH (En Low Koh Hwa @ Low Kok Hwa). We shall also refer to the learned High Court Judge as HCJ.

D [3] Appeal No. 202 is PKKS's appeal against the decision of the HCJ in allowing LKH's application to set aside the Arbitration Award (the award) dated 12 February 2020 *vide* Saman Pemula No. BA-24C(ARB)-4-05-2020 (O.S No. 04). Whereas, Appeal No. 203 is PKKS's appeal against the decision of the HCJ in dismissing the application by PKKS to enforce the same award *vide* Saman Pemula No. BA-24C-87-09-2020 (O.S No. 87).

E Decision Of The High Court

[4] The HCJ heard both O.S No. 04 and O.S No. 87 together and on 28 December 2020 delivered his decision which favoured LKH as follows:

- F (i) Saman Pemula No. BA-24C (ARB)-4-0 5-2020 (O.S No. 04) by LKH is allowed with costs. Hence, the whole award dated 12 February 2020 is set aside.
- (ii) Saman Pemula No. BA-24C-87-09-2020 (O.S No. 87) by PKKS is dismissed with costs.

G Appeal No. 202 And Appeal No. 203

[5] Aggrieved by the abovesaid decisions, PKKS appealed to the Court of Appeal *vide* Appeal No. 202 dan Appeal No. 203. Hence, both the appeals before us herein.

H [6] The HCJ prepared one grounds of judgment for both O.S No. 04 and O.S No. 87. Hence, with the concurrence of all parties involved, we heard both Appeal No. 202 and Appeal No. 203 at one go.

I [7] Learned counsel for both sides agreed for Appeal No. 202 be made the main appeal and that in the event Appeal No. 04 is dismissed and the decision of the HCJ is affirmed, Appeal No. 203 shall then be academic and shall also be accordingly dismissed.

The Arbitration Proceeding

A

[8] Relating to the arbitration proceeding, the undisputed facts and chronology of events are as follows:

- (i) PKKS appointed LKH, a certified architect for the re-construction of its spastic centre, Spastic Centre Petaling Jaya. The costs of the project totalled RM20 million. B
- (ii) Subsequently, disputes arose between PKKS and LKH as to the balance of the professional fees payable to LKH for the works/services rendered. LKH claimed that PKKS still owed him the amount of RM485,269.33 being the balance of his professional fees due and owing. PKKS disputed LKH's claim. Instead, PKKS claimed to have paid LKH the sum of RM868,600 which it averred to be more than enough for the works undertaken by LKH. The parties agreed to refer their said dispute to arbitration. C
- (iii) The arbitration proceeding went on for two days *ie*, on 28 December 2019 and 30 December 2019. Initially, on the first date, LKH represented himself, whilst PKKS was represented by counsel. D
- (iv) What transpired on the first day of proceeding is this: On 28 December 2019, after LKH had finished giving evidence and before PKKS's witness Dato' Dr Mohinder Singh was to give his evidence, the arbitrator informed LKH that he is an acquaintance of the said witness. E
- (v) Following the disclosure by the arbitrator, the arbitration proceeding was then adjourned to 30 August 2019 for continued hearing, to give a chance to LKH to appoint a lawyer to represent him on the next/proceeding date. F
- (vi) On 30 December 2019, LKH turned up with his counsel. There was no record to show that LKH or his counsel had raised any objection to the arbitrator, Ar Akbal Singh continuing to preside as arbitrator. Thus, the arbitration proceeded on before the same arbitrator until the end. On 12 February 2020, the arbitrator announced his final arbitration award (the award) which favoured PKKS. The award, in brief, are as follows: G
 - (a) that LKH is only entitled to claim the amount of RM747,250 as professional fee from PKKS; H
 - (b) that LKH is estopped from claiming from PKKS professional fee in excess of the amount of RM747,250;
 - (c) that PKKS had overpaid LKH the amount of RM72,750. Therefore, that amount overpaid shall be refunded by LKH to PKKS; I

- A (d) that LKH shall pay interest at the rate of 5% per annum on the amount overpaid from the date of the award until full realisation; and
- (e) the costs of the arbitration totalling RM36,598 shall be paid by LKH.

B **The Applications Before The High Court**

- [9] Flowing from the award above mentioned, LKH applied to set aside the said award pursuant to s. 37(1) of the Arbitration Act 2005 (AA 2005) *vide* Saman Pemula No. BA-24C (ARB)-4-05-2020 (O.S No. 4). On the other
- C hand, PKKS applied to register the said award for the purpose of enforcement under s. 38(1) of AA 2005 *vide* Saman Pemula No. BA-24C-87-09-2020 (O.S No. 87).

Findings And Decision By The High Court

- D [10] On 28 December 2020, the HCJ allowed LKH's application (O.S No. 04) and dismissed PKKS's application (O.S No. 87).

[11] Briefly, in allowing LKH's O.S and in dismissing PKKS's O.S the learned HCJ made the following findings:

- E (i) Firstly, the award/order for "overpayment" and "interest on overpayment" (awards 'c' dan 'd') is something outside and is in excess of the "Terms of Submission to Arbitration" and therefore had breached s. 37(1)(a)(iv) of AA 2005. The learned HCJ referred to the case of *Thai-Lao Lignite Co Ltd & Anor v. Government Of The Lao People's Democratic Republic* [2017] 9 CLJ 273 in finding that s. 37(1)(a)(iv) had
- F been successfully invoked by LKH. The HCJ also referred amongst others to the High Court case of *Magna Prima Construction Sdn Bhd v. Bina BMK Sdn Bhd & Another Case* [2015] 11 MLJ 841 which held as follows:

- G Where the conditions of sub-para 37(1)(a)(iv) are met, the whole award will be set aside; and not just that part which is challenged; unless of course, if the same complaints can be raised under sub-para 37(1)(a)(v). This is clear from a plain reading of sub-paras 37(1)(a)(iv) and (v).

- H (ii) Secondly, the arbitrator had failed to make full and timeous disclosure of his relationship with PKKS's witness before the commencement of the arbitration proceeding and had only did so after LKH concluded his testimony.

- I [12] The HJC found that the arbitrator had acted unfairly and had breached 'public policy' in failing to make full and timeous disclosure of his relationship with PKKS's witness which according to the HCJ warrants the whole award to be set aside. The HCJ referred to amongst others, the following case authorities, *Magna Prima Construction Sdn Bhd v. Bina BMK*

Sdn Bhd & Anor Case (supra); *Garden Bay Sdn Bhd v. Sime Darby Property Bhd* [2018] 6 CLJ 199; [2018] 2 MLJ 636 and *Master Mulia Sdn Bhd v. Sigur Rus Sdn Bhd* [2020] 9 CLJ 213; [2020] MLJU 1329.

[13] The learned HCJ found s. 37(3) of AA 2005 to be inapplicable, to sever the award for “overpayment and interest for overpayment” from the rest of the award. Therefore, the HCJ set aside the whole of the award.

Submissions Of The Parties At The Appeal Stage

[14] On the whole, before us, learned counsel for both sides repeated/reiterated what they had submitted before the High Court on the law and facts for O.S. No. 4 and O.S. No. 87.

Appellant’s (PKKS) Submission

[15] For Appeal No. 202 (setting aside) counsel submitted that it ought to be allowed as the HCJ had erred in ruling that the award/order on “overpayment and interest for overpayment” is one that is outside the scope of the “Terms of Submission to Arbitration” and that it is a new different which warrants the whole award to be set aside. According to counsel, even if the award on “overpayment and interest for overpayment” is one that is outside the scope of the “Terms of Submission to Arbitration”, the learned HCJ should have only set aside that part of the award *ie*, award/order (b) and (c) pursuant to s. 37(3) of AA 2005, instead of the whole award *ie*, awards/orders (a), (b), (c) and (d).

[16] Counsel referred to the decision in *Garden Bay Sdn Bhd v. Sime Darby Property Sdn Bhd (supra)* on the doctrine of separability/severability in setting aside part of an arbitrator’s award.

[17] Counsel further submitted that even if the award/order on “overpayment and interest for overpayment” is one that is outside the scope of the “Terms of Submission to Arbitration”, since the award/order is one that is very clear and specific in nature, the said award/order can and should have been severed from the other awards/orders *ie*, from prayers (a) and (d). In the circumstances, it was submitted that the learned HCJ was plainly wrong in failing to exercise his discretion under s. 37(3) of AA 2005.

[18] As to the application of s. 14 of AA 2005 against the arbitrator, counsel also submitted that the HCJ was clearly in error because LKH had failed to object to the Arbitrator in continuing to arbitrate even after being informed by the Arbitrator of his relationship with PKKS’s witness. According to counsel, s. 15 of AA 2005 clearly provides that any objection against the appointment of an Arbitrator shall be made within 15 days from being made aware of the impugned facts.

[19] Hence, counsel submitted that LKH is estopped from raising any objection on the appointment of the arbitrator before the HCJ and/or herein at the appellate stage. Therefore, counsel submitted that Appeal No. 202 should be allowed with costs.

A The Respondent's (LKH) Submission

[20] In response, as regard the award for “overpayment and interest for overpayment”, LKH’s counsel submitted that the said award is inseverable from the other awards as a whole. Therefore, the HCJ did not err in not exercising his discretion under s. 37(3) and instead of under s. 37(1)(a)(iv) of AA 2005.

[21] Furthermore, counsel submitted that the learned HCJ did not err in ruling that the arbitrator had contravened s. 14 of AA 2005 when he failed to fully and timeously inform/notify parties of his relationship/acquaintance with the witnesses for PKKS, Dr Mohinder Singh. Consequentially, according to counsel, before the High Court, LKH is not estopped from raising objection relating to the appointment of Ar Akbal Singh Sandhu as arbitrator or to dispute his independence dan impartiality as arbitrator in the proceeding.

[22] In the circumstances, LKH’s counsel submitted that the arbitrator’s award had contravened public policy and therefore the learned HCJ was correct in invoking s. 37(1)(b)(ii) of AA 2005 which provides that:

An award may be set aside by the High Court if:

(a) ...

(b) the High Court finds that:

(i) ...

(ii) the award is in conflict with public policy of Malaysia.

[23] Counsel submitted that the learned HCJ was corret in relying to the cases of *Thai-Lao Lignite Co Ltd & Anor v. Government Of The Lao People's Democratic Republic* [2017] 9 CLJ 273 and *Magna Prima Construction Sdn Bhd v. Bina BMK Sdn Bhd & Another Case* [2015] 11 MLJ 841 in finding that s. 37(1)(a)(iv) had been successfully invoked by LKH.

[24] Thus, to recapitulate, counsel submitted that the decision and order of the HCJ in setting aside the whole award should be affirmed and be upheld. Therefore, counsel asked for Appeal No. 202 to be dismissed with costs.

[25] Predicated on the abovementioned, the main issues for our determination for Appeal No. 202 are:

(i) Whether the HCJ had erred in setting aside the whole award?

(ii) Whether the HCJ erred in applying/invoking s. 37(3) of AA 2005?

(iii) Whether Ar Akbal Singh as arbitrator had breached s. 14 of AA 2005?

(iv) Whether the HCJ erred in finding that the arbitrator had breached ‘public policy’ of Malaysia?

(v) Whether LKH is estopped from raising objection relating to the appointment of Ar Akbal Singh Sandhu as an arbitrator?

Our Findings And Decision

A

[26] The Court of Appeal in the case of *Jan De Nul (Malaysia) Sdn Bhd & Anor v. Vincent Tan Chee Yioun & Anor And Other Appeals* [2017] LNS 1580 states the following:

[12] It is now well settled that in Malaysia, the arbitrators' award is final, binding and conclusive and can only be challenged in exceptional circumstance. This jurisprudence is unique to Malaysia and is well articulated in section 36 of AA 2005.

B

[27] Hence, for the appeals before us, to answer whether there exist any exceptional circumstances to warrant the HCJ to set aside the award wholly, the main issues as listed at paras. [30](i), (ii), (iii), (iv) and (v) aforesaid need to determine and after having appraised the appeal records and having considered the submissions by counsels for both sides, our findings to the issues raised are as follow:

C

Issues (i) And (ii)

D

Whether The HCJ Had Erred In Setting Aside The Whole Award?

Whether The HCJ Erred In Applying/Invoking Section 37(3) of AA 2005?

[28] To start with, we refer to the case of *Kerajaan Malaysia v. Perwira Bintang Holdings Sdn Bhd* [2015] 1 CLJ 617; [2015] 6 MLJ 126 wherein it was held as follows:

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... the mandate of the arbitrator must be limited to the terms defined by the parties for him to exercise his jurisdiction. If the arbitrator strays from the confines of the mandate, he will be acting in excess of his jurisdiction, even though he may have the initial and primary jurisdiction to arbitrate between the parties ...

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[29] Based on the principle abovementioned, it is noteworthy that during submission before us, learned counsel for PKKS conceded that awards/orders (b) and (c) *ie*, for "overpayment and interest for overpayment" are awards/prayers outside and beyond the scope and the "Terms of Submission to Arbitration". Hence, we agreed with LKH's counsel that the learned HCJ did not err in setting aside the awards/orders (c) and (d). However, as to the other awards *ie*, awards (a) and (d), in our considered view, the awards (a) and (d) ought to be left undisturbed and be registered as judgment of the court for enforcement.

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[30] In our view, that would be in line with the policy and international practice which encourages finality to the process and awards of arbitration by limiting and minimising interference by the courts. In the case of *Jan De Nul (Malaysia) Sdn Bhd & Anor v. Vincent Tan Chee Yioun & Anor* [2019] 1 CLJ 1; [2019] 2 MLJ 413, the Federal Court said as follows:

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... The court must also consider the background policy of encouraging arbitral finality and minimalist intervention approach to be adopted in line

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- A with the spirit of UNCITAL Model Law. The effect of ss. 8, 9, 37 and 42 of the AA 2005 is that the court should be slow in interfering with or setting aside an arbitral award.
- [31] Although we agreed with the learned HCJ that the awards pertaining to “overpayment” (awards ‘c’ and ‘d’) should be set aside for being one that is outside the scope of reference to the arbitration, we are not able to agree with His Lordship’s decision to set aside the award wholly. In our considered view, since the award pertaining to “overpayment” is very clear, specific and distinct, it can easily be severed from the rest of the other awards. As such we find, in the circumstances, the HCJ had erred and was plainly wrong in failing to invoke s. 37(3) of AA 2005 which stipulates:
- C Where the decision on matters submitted to arbitration can be separated from those not so submitted, only that part of that award which contains decisions on matters not submitted to arbitration may be set aside.
- [32] Based on the facts and circumstances as a whole and the principle abovesaid, we agreed with learned counsel for PKKS that the HCJ had erred in invoking s. 37(1)(a)(iv) of AA 2005 and in not applying s. 37(3) of AA 2005 instead. In our considered view, s. 37(3) of AA 2005 is clearly applicable and ought to have been invoked by the learned HCJ. We referred and applied the principle as decided in the Federal Court case of *Thai-Lao Lignite Co Ltd dan Anor v Government of the Lao People’s, Democratic Republic* (*supra*) wherein Jeffrey Tan FCJ at para. 197 said:
- F [197] In relation to ‘the award deals with dispute not contemplated by or not falling within the terms of the submission to arbitration’ and ‘the award contains decisions on matters beyond the scope of the submission to arbitration’, *William & Kawharu supra* at 17.5.4 thus commented on the first limb of art. 34(2)(a)(iii) of the NZ Arbitration Act (the equivalent of section 37(1)(a)(iv) and (v) of AA 2005):
- G This ground for setting aside is directed at situations in which a tribunal has jurisdiction under a valid arbitration agreement, but exceeded the authority by dealing in the award with matters that go beyond the terms of the arbitration agreement or the scope of the issues referred by the parties for resolution. The tribunal also has an obligation to take particular care to keep within the confines of these matters that the parties that the parties have plainly put in issue ... *If the tribunal exceeds its authority in respect of some matters only, and its decisions on those matters are severable from decisions on matters made within the submission to arbitration, the High Court may only set those parts of the award containing the decisions on matters not submitted to arbitration.*
- H (emphasis added)
- I [33] Coming back to the appeals before us, it is our considered view that, that award/order (b) and (c) which concerned matters outside the ambit of the “Terms of Submission to Arbitration” can be easily severed from the other awards/orders *viz*, award/order (a) and (d).

[34] We are minded of the principle that the exercise of discretion by the court should not be disturbed. We are of the considered view that the learned HCJ ought to have invoked s. 37(3) of AA 2005 which gives the court the discretion to set aside only any award which was erroneously handed down in excess of the “Terms of Submission to Arbitration” and simultaneously maintaining other awards/order made within the said “Terms of Submission to Arbitration”. Hence, we find that the learned HCJ was plainly wrong in ruling that the award/order on “overpayment” is inseverable and in using s. 37(1)(a)(iii) of AA 2005 instead. Therefore, in the facts and circumstances, we find only award/order (b) and (c) should be set aside, whereas, award/order (a) and (d) should be maintained.

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Issues (iii) – (v):

Whether The HCJ Had Erred In Finding That The Arbitrator Had Breached The ‘Public Policy’ Of Malaysia?

[35] Issues (iii) to (v) are inter-related. Hence, they are taken together.

D

(iii) Whether Ar Akbal Singh As Arbitrator Had Breached s. 14 AA 2005?

[36] Apart from finding that the arbitrator had contravened s. 37(1)(a)(iii) of AA 2005, the HCJ also found that s. 37(1)(b)(ii) of AA 2005 had been breached. The undisputed facts of our case showed that the arbitrator only informed LKH of his relationship with Dr Mohinder Singh, a witness and representative of PKKS only on the first date of proceeding. Based on the facts aforesaid, the HCJ ruled that the arbitrator failed to make full and timeous disclosure of his relationship which he is obliged to do pursuant to s. 14(1) and (2) of AA 2005 which provides as follows:

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14(1) A person who is approached in connection with that person’s possible appointment as an arbitrator shall disclose any circumstances likely to give rise to justifiable doubts as to that person’s impartiality or independence.

14(2) An arbitrator shall, without delay, from the time of appointment and throughout the arbitral proceedings, disclose any circumstances referred to in sub-s. (1) to the parties unless the parties have already been informed of such circumstances by the arbitrator.

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[37] Section 14(3)(a) provides:

14(3) An arbitrator may be challenged only if:

H

(a) the circumstances give rise to justifiable doubts as to that arbitrator’s impartiality or independence;

[38] The learned HCJ found that although the arbitrator did disclose to LKH of his relationship with Dr Mohinder Singh on the 28 August 2018, he had failed to disclose fully all the relevant information pertaining to his relationship with PKKS’s witnesses and therefore had contravened s. 14 of AA 2005 and had breached ‘public policy’ under s. 37(1)(b)(ii) of AA 2005.

I

- A For the abovesaid reasons, the HCJ decided that the whole award of the arbitrator ought to be set aside. The HCJ referred to the case of *Dato' Dr Muhammad Ridzuan Mohd Salleh & Anor v. Syarikat Air Terengganu Sdn Bhd* [2012] 6 CLJ 156; [2012] 3 MLJ 737.
- B [39] We agreed with the HCJ as to the duty to make full and timeous disclosure imposed by the Act on the arbitrator. We also concurred with the HCJ that the arbitrator failed to declare his relationship with Dr Mohinder Singh before the proceeding commences. However, we are unable to agree with the HCJ that the arbitrator did not make full disclosure of his relationship with PKKS's witness. The HCJ in para. 29(2) grounds of judgment said the following:
- C (2) The arbitrator could have made a belated Full Disclosure of the Arbitrator's Relationship on the first day of the Hearing. Inexplicitly, the Arbitrator did not do so.
- D [40] We are of the view that the HCJ had plainly erred in His Lordship's finding that there was no full disclosure by the arbitrator. Based on the notes of proceeding, in our considered view, the arbitrator had disclosed fully the crucial information *ie*, of his relationship with Dr Mohinder Singh. In our view, the declaration/information by the arbitrator of his relationship/acquaintance with the said witness is more than enough/sufficient to trigger
- E a concern of impartiality or independence of the arbitrator, for LKH to raise a complaint and to invoke s. 15(1) of AA 2005 which provides as follows:
- F 15(1) Unless otherwise agreed by the parties, any party who intends to challenge an arbitrator shall, within fifteen days after becoming aware of the constitution of the arbitral tribunal or of any reasons referred to in subsection 14(3), send a written statement of the reasons for the challenge to the arbitral tribunal.
- [41] Section 14(3)(a) provides:
- 14(3) An arbitrator may be challenged only if:
- G (a) the circumstances give rise to justifiable doubts as to that arbitrator's impartiality or independence;
- H [42] In fact, if we were to scrutinise the notes of proceeding dated 28 August 2018 concerned, it shows that even earlier on, the arbitrator had already informed LKH of his relationship with Dr Mohinder Singh and what the arbitrator did after Dr Mohinder Singh gave evidence and before LKH was to testify was to repeat/reiterate what he had declared earlier. That particular note of proceeding states as follows:
- I Arbitrator: Datuk (Mohinder), you can take your seat. Low, **like I told you**, I know Datuk (Mohinder), but it is not Spastik. So, it is inevitable that in this field, we know counsels (*sic*), we know about each other
- (emphasis added)

[43] It is our considered view that even though the arbitrator did not make the required declaration “timeously” pursuant to s. 14 of AA 2005, we are unable to agree with the HCJ that there was no full disclosure. On the contrary, we find that the arbitrator had declared to LKH the most crucial fact and information *ie*, that he knew/was an acquaintance of Dr Mohinder Singh of PKKS.

[44] Hence we are of the considered view that the HCJ was plainly wrong and had misdirected himself in invoking s. 14 of AA 2005. We find no exceptional circumstances to warrant the HCJ to set aside the whole award.

(v) Whether LKH Is Estopped From Raising Objection Relating To The Appointment Of Ar Akbal Singh Sandhu As An Arbitrator?

[45] As mentioned earlier on, we found that the arbitrator had on 28 August 2019 disclosed fully of his relationship with Dr Mohinder Singh. In our view, if LKH was genuinely concerned with the arbitrator’s independence and impartiality, then he should have exercised his right and objected to the arbitrator’s appointment and from him continuing to arbitrate. Section 14(3)(a) of AA 2005 which accorded LKH with that right and option to object provides the following:

14(3) An arbitrator may be challenged only if:

(a) the circumstances gives rise to justifiable doubts as to that arbitrator’s impartiality or independence; or

(b) ...

[46] The abovementioned disclosure by the arbitrator, in our view, provided to LKH the avenue object under s. 15(1) of AA 2005 which provides as follows:

15 (1) Unless otherwise agreed by the parties, any party who intends to challenge an arbitrator shall, within fifteen days after becoming aware of the constitution of the arbitral tribunal or of any reasons referred to in subsection 14(3), send a written statement of the reasons for the challenge to the arbitral tribunal.

[47] However, the undisputed facts revealed that LKH failed to exercise that right. Instead, LKH opted to proceed on with the arbitration before the same arbitrator and it was only when the arbitrator’s award/decision did not go his way that LKH raise the issue as to the independence and impartiality of the arbitrator before the High Court.

[48] In our view, what can be deduced from LKH’s conduct in not objecting to the continued appointment of the arbitrator even after being made aware of the arbitrator’s relationship with PKKS’s witness, is that it shows that LKH had full faith in the arbitrator independence and impartiality. Hence, even though the arbitrator’s disclosure was only made

A to LKH on 28 December 2019, we do not think that LKH was ever prejudiced and that there was no contravention/breach of public policy, in the circumstances.

[49] The learned HCJ failed to consider the failure by LKH to object to the arbitrator's appointment or to the arbitrator to continue to arbitrate, despite
B after the disclosure of the arbitrator on 28 August 2019. On this issue, s. 14(4) of AA 2005 provides the following:

A party may challenge an arbitrator the appointment of that party, or in whose appointment that party has participated, only for reasons which that party becomes aware of after the appointment has been made.

C [50] In our case, on 28 August 2018, after having disclosed to LKH, the arbitrator gave an opportunity to LKH to engage a lawyer. In our considered view, the conduct by the arbitrator manifested him as being just and impartial and the fact that LKH did not contemporaneously object or applied for the
D recusal/termination of the arbitrator for further sitting in the arbitral proceeding, showed that LKH did not doubt the arbitrator's ability, independence and impartiality. The fact that the arbitrator did not hide/conceal the fact relating to his acquaintance with PKKS's witness, proved that he was being forthright. Had LKH doubted the independence and impartiality of the arbitrator then, he would certainly have objected promptly.
E

[51] Thus, counsel for PKKS submitted that LKH should be estopped from raising objection relating to the appointment or to the continuation of the arbitrator at the High Court. We are in agreement with the counsel for PKKS. In our view, any objection relating to the appointment or status of
F an arbitrator, the statutory provision applicable is s. 15(1) of AA 2005 which mandated objection to be made within 15 days of the date of such disclosure. In our view, the action by LKH in only raising issue/objection the appointment of the arbitrator before the High Court *vide* O.S. No. 04, is clearly an attempt to circumvent the provision of s. 15(1) of AA 2005, which
G to us is an abuse of process of court.

[52] We also observed that on 30 December 2019, LKH had engaged counsel to represent him on the subsequent date fixed for continued hearing of the arbitral proceeding and that his counsel too did not challenge/object
H to the arbitrator to continue as with his function. Hence, not only did LKH not object/challenge under s. 15(1) of AA 2005, LKH had opted to proceed on with the arbitration proceeding in front of the same arbitrator. LKH only raise objection against the arbitrator, including for breach of s. 14 of AA 2005 before the High Court, when the decision before the arbitrator did not
I favour him.

[53] Therefore, after having agreed earlier on to have the arbitrator to remain and to proceed to arbitrate his claim against PSSK, in our view, LKH cannot be permitted to make a sudden 'U-Turn' and to thereafter bring up allegation of biasness and/or partiality on the part of the same arbitrator, when the decision went against him.

A

[54] In the upshot, we are of the view that the action by LKH in challenging the independence and impartiality of the arbitrator as one of the grounds to set aside the whole award *vide* O.S. No. 04 clearly an afterthought.

B

[55] Hence, we find that the learned HCJ had committed an appealable error and was plainly wrong in allowing LKH's application to set aside the whole award on the basis that there was clear/apparent biasness on the part of the arbitrator.

C

Conclusion

Appeal No. 202 (Originating Summon No. 87):

D

[56] For Appeal No. 202 (for O.S. No. 04), we allowed the appeal in part that is, award/order (a) and (d) is reinstated. The decision/order of the High Court in setting aside award/order (b) and (c) is affirmed.

Appeal No. 203 – Originating Summon No. 87:

[57] *Vide* O.S. No. 87, PKKS applied under s. 38 of AA 2005 to enforce the award. Consequent to decision/order of the High Court setting aside the whole award, O.S. No. 87 was ruled to be academic. Therefore, without having to consider Appeal No. 203, the High Court dismissed O.S. No. 87 by PKKS with costs.

E

[58] Thus, for Appeal No. 203, after having appraised the appeal records and the submissions by counsels, we find that PKKS had succeeded in proving the ingredients/elements of s. 38 of AA 2005. Conversely, we find that LKH failed to proffer any valid grounds to the contrary, in challenging the registration and enforcement under s. 39 of AA 2005. Thus, Appeal No. 203 we allowed award/order (a), (d) and (e) to be enforced pursuant to s. 38 of AA 2005.

F

G

Costs

[59] In the circumstances, we gave costs of RM5,000 for each appeal to the appellant/PKKS, subject to allocator.

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I